Supreme Court, U.S.
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No. 03-192

IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS and ALEXANDER PIRNIE,

Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, respondent, ELECTRICAL INSPECTORS, INC., objects to the questions presented by petitioners VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE ("petitioners") because they are unduly argumentative in violation of Supreme Court Rule 14.1(a) and seek consideration of questions not accurately reflecting the proceedings or holding below. If this Court is inclined to grant certiorari in this action, respondent respectfully submits that the following are more accurately-phrased questions:

1. Was the Second Circuit correct in applying the "active supervision" requirement set forth in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in reversing summary judgment based on allegations that a private corporation, authorized by local municipalities to exclusively provide a state mandated service pursuant to contracts with other private parties, had been allowed "to use its power of exclusivity to determine the price, terms, and quality of its services. . . ."? Pet., A at 26a.

2. Was the Second Circuit correct in holding that the petitioners' alternative argument that the Village of Islandia had engaged in "active supervision" of the private party petitioner a "heavily factual issue" that could not be resolved based on the appellate record?

STATEMENT PURSUANT TO RULE 29.6

ELECTRICAL INSPECTORS, INC. is a business corporation. It has no parent or publicly held company owning any of its shares.

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STATEMENT OF THE CASE

The respondent, ELECTRICAL INSPECTORS, INC. (the "respondent") provides electrical inspection and certification services to property owners in direct competition with the private party petitioner. The respondent seeks money damages, declaratory and injunctive relief for the anti-competitive activity of petitioner, NEW YORK BOARD OF FIRE UNDERWRITERS (hereinafter "THE BOARD") in municipalities throughout Nassau and Suffolk Counties in the State of New York. Respondent claims that THE BOARD illegally maintained unregulated monopolies in many municipalities on Long Island which compelled property owners to enter into contracts with THE BOARD for electrical inspection/certification services. THE BOARD's abuse of its monopoly power has been facilitated due to the absence of local governmental supervision of services and/or regulation of fees.[1] We emphasize that the respondent claims not merely inadequate supervision, but the absence of *any* supervision of the terms, services or fees rendered by The Board to other private parties.

The respondent seeks declaratory and injunctive relief from the conduct of petitioner VILLAGE OF ISLANDIA (hereinafter "ISLANDIA"), which passed a resolution in 1988 that granted a perpetual, unlimited and unsupervised exclusive franchise to THE BOARD. Henceforth, all ISLANDIA property owners were required to hire and pay THE BOARD. This legislation was not self-policing and failed to include any means of municipal supervision

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1. It is claimed that THE BOARD exploited its monopoly power through deceptive business practices, unfair competition, substandard service, trade disparagement and retaliatory threats.

of the private party monopolist. *See* Ct. App. J.A. 79. The petitioners' brief incorrectly states that ISLANDIA's resolution was "renewed annually" suggesting some degree of further legislative consideration. Pet. at 1. To the contrary, ISLANDIA's Mayor Falco explained that the 1988 resolution was never repealed but that the Village Board of Trustees could exercise a negative option to repeal the resolution if THE BOARD failed to properly perform its obligations. *See* Ct. App. J.A. 607, 611 (affidavit of Mayor Frank B. Falco, ¶16).

THE BOARD is a not-for-profit corporation whose membership consists of 96 insurance companies who sell fire insurance policies in the State of New York.[2] The insurance industry, through THE BOARD, controls the terms of electrical inspection service in a substantial part of New York State. According to the petitioners, ISLANDIA is just one of approximately 250 municipalities in the State of New York (out of 1000) that have established an exclusive franchise for the benefit of THE BOARD. Pet. at 3. These municipalities do not supervise electrical inspection services or regulate THE BOARD's fees. Rather, it is THE BOARD that establishes a statewide rate structure applicable to all property owners it contracts with.

It is conceded that THE BOARD does not negotiate its rate structure with property owners or municipalities. Indeed, the District Court found that ISLANDIA "does not purport to regulate THE BOARD's fees". *See* Ct. App. J.A. 824.

2. Though there has been litigation arising from state action immunity issues concerning what constitutes a "private" or "public actor", THE BOARD does not contest its characterization by the District Court as a private party. *Fuchs v. Rural Elec. Convenience Coop.*, 858 F.2d 1210 (7th Cir. 1988).

THE BOARD claims that its fees are set below cost and that it is able to operate at a loss because it is subsidized by its member insurance companies. *See* Ct. App. J.A. 458 (affidavit of Alexander Pirnie, ¶16). Despite the insurance industry subsidy, respondent's president advised the lower court that: ". . . depending on the nature and type of electrical work performed, the residents of Islandia and Oyster Bay Cove would save money if allowed to hire plaintiff Electrical Inspectors, Inc." *See* Ct. App. J.A. 650 (affidavit of Richard M. Bivone).

The nature of the anti-competitive activity challenged is private because it concerns only the contractual relationship between THE BOARD and each individual property owner. As noted by the Second Circuit: ". . . when THE BOARD conducts an inspection, or allegedly threatens those who hire the plaintiff, it is engaging in transactions or seeking to engage in transactions with other private parties, not the Village." Pet. App. at 25a. Since THE BOARD is not directed or supervised, its activities do not constitute "official action" but are merely those of an outside contractor operating independently with the general public. Moreover, many of the allegations of misconduct alleged against THE BOARD, such as deceptive business practices, unfair competition, trade disparagement and harassment of electricians, are clearly not those of the involved municipalities. The antitrust injury alleged flows from the acts of a private corporation subsequent to obtaining a monopoly.

The respondent claims that the monopoly held by THE BOARD in many municipalities, including ISLANDIA, is "even more harmful due to the absence of governmental regulatory control . . .". *See* Ct. App. J.A. 42. THE BOARD did not submit any evidence to demonstrate that other

municipalities had engaged in any supervision of its services. Though ISLANDIA claimed that it informally and periodically inspected the work of the electrical inspectors employed by THE BOARD, a sharp issue of fact was presented based on the affidavits of Richard Jendzo and Richard M. Bivone. *See* Ct. App. J.A. 697 and 646, respectively.[3] According to the Jendzo affidavit, THE BOARD used unsupervised, uncertified, low paid electrical inspectors in ISLANDIA who "supplemented their salaries by accepting unreported cash gifts from electrical contractors". *See* Ct. App. J.A. 697. In fact, the lower court never resolved the heavy factual issues regarding whether government officials in ISLANDIA actively supervised the contract terms and services rendered by THE BOARD. Therefore, once it found the *Midcal* test applied, the Second Circuit properly remanded this factual issue to the District Court to determine if there was adequate active supervision of THE BOARD by ISLANDIA and other municipalities.

REASONS FOR DENYING THE PETITION

All parties agree that THE BOARD is a private party; that it has been given an exclusive franchise by many local governments, including ISLANDIA, to provide electrical inspection/certification services; that THE BOARD independently enters into contracts with other private property owners to provide its services for a fee; that THE BOARD does not negotiate its fees with local governments or property owners, but unilaterally fixes a statewide schedule

3. The District Court was advised by an electrical inspector, Richard Jendzo formally employed by The Board (presently employed by respondent), who had been assigned to Islandia, that the latter "did not supervise my inspections or instruct me in the manner of how those instructions should be performed." Ct. App. J.A. 698.

of fees. The petitioners raised a hotly disputed issue of fact on whether ISLANDIA actively supervises THE BOARD; however, THE BOARD did not submit any evidence refuting the respondent's claim that it was unsupervised by all other municipalities.

Among the questions presented by the petitioners is whether the respondent's claims should be dismissed pre-discovery on a Rule 56 Federal Rules of Civil Procedure summary judgment motion based on the state action immunity doctrine even though: (1) the petitioners admit that ISLANDIA and other municipalities do not participate in or supervise the fees charged by THE BOARD; (2) there is a hotly disputed question of fact on whether ISLANDIA has actively supervised THE BOARD; and (3) THE BOARD has not submitted evidence to overcome the respondent's claim that other municipalities neglected to actively supervise it.

The Second Circuit properly found that immunity for anti-trust violations would not be available unless the petitioners satisfied the two-prong test set forth by this Court in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Second Circuit noted that the District Court: "did not determine whether THE BOARD was actively supervised, holding instead that this part of the ***Midcal*** test need not be met. We decline to decide this heavily factual issue in the first instance on the record before us." Pet., App. A at 28a. The petitioners were not entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in light of the unresolved fact issues.

There is no conflict amongst the Circuit Courts or lack of clarity from the Supreme Court on the active supervision requirement set forth in *Midcal*.[4] The petitioners raise the spector of excess litigation and possible loss of private party participation in state programs due to the factual findings that may be necessary in order to satisfy *Midcal's* active supervision requirement. Recognizing these very same concerns, Justice Scalia wrote in his concurring opinion for *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992):

> . . . this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonment of some state programs because private individuals will not take the chance of participating in them . . . I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place.

The petitioners also implicitly raise a false issue in suggesting that the degree of active supervision necessary is an important and ripe issue. This issue is not ripe. There have not been any findings of fact on petitioner's affirmative defense since their motion for summary dismissal preceded discovery.

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4. The New York State Attorney General filed an amicus curiae brief supporting the respondent. *See* Ct. App. J.A. 306. In 1983 another New York State Attorney General filed an amicus curiae brief (on the applicability of the state action immunity doctrine to a state anti-trust claim) and opined that THE BOARD would have to satisfy the *Midcal* test. *See* Ct. App. J.A. 207, 219.

THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THE STANDARDS WELL ESTABLISHED BY THIS COURT

Since the seminal holding of *Parker v. Brown*, 317 U.S. 341 (1943), the Court has continued to refine the standards that govern state action immunity with respect to anti-trust actions involving state or local government entities. Over time, the actions of private parties in pursuit of a state's statutory mandate have also become subject to *Parker* immunity. For a private party that behaves anti-competitively to avail itself of this immunity, it must be able to show that the actions taken were not only authorized by state policy, but that its anti-competitive conduct was supervised by the state. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). The *Midcal* standard, as opposed to the standard set forth in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) must be applied to THE BOARD's actions because it is the anti-competitive activity of THE BOARD that has caused the anti-trust injury to the respondent. The vitality of Parker and its progeny regarding the ant-trust liability of private parties was confirmed by the Court in *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992):

> *Midcal* confirms that while a state may not confer anti-trust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the state and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general

> auspices of state law, is the pre-condition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State . . .

Ticor explains that the purpose of the active supervision inquiry is to determine and confirm that the best interests of the state are being served rather than that of the private parties. The active supervision requirement is necessary to establish "whether the State has exercised sufficient independent judgment and control so that the details of the rates for prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634. The holding noted that the presence of state regulatory instruments is insufficient to meet the active supervision requirement. The tools of state regulation must actually be used. The active supervision requirement "serves essentially an evidentiary function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36 (1985).

The municipalities complained of, including ISLANDIA do not maintain any written regulations governing the conduct of the private party to whom they granted a monopoly. There is and can be no claim here that "the state exercises ultimate control over the challenged anti-competitive conduct . . . The mere presence of some state involvement or monitoring does not suffice". *Patrick v. Burget*, 486 U.S. 94 (1988). ISLANDIA admittedly plays no role in establishing THE BOARD's fees. Claims supported by competent evidence that other municipalities do not supervise THE BOARD were not rebutted. *See* Ct. App. J.A. 36, 646, 697 (amended complaint, affidavits of Richard M. Bivone and Richard Jendzo, respectively). ISLANDIA raised an issue of fact and insisted that supervision was exercised over delivery of services and that it maintained a negative option.

The Supreme Court in *Patrick* rejected the immunity claims of the private party defendants because they had failed to satisfy active state supervision of "private decisions regarding hospital privileges to determine whether such decisions comport[ed] with state regulatory policy and to correct abuses". 486 U.S. at 101. This decision was significant because the active supervision requirement of *Midcal* was applied to a case that did not involve price fixing.

Although it predates *Ticor* by four years, *Patrick* highlights the wide scope of anticompetitive activity that active supervision must police. Anticompetitive behavior takes many insidious forms from a competing hospital's physicians providing unfavorable peer review to a rival electrical inspection company that takes a market hostage using predatory marketing tactics. *Patrick* and *Ticor* clearly elucidate the active and direct role state supervisory bodies must take because "[a]bsent [supervision], there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 486 U.S. at 101. These two cases stand for the proposition courts must look beyond what states *can* do but instead focus on the *actual* steps taken to monitor private conduct to determine if active supervision was taken.

THERE IS NO CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING THE ACTIVE SUPERVISION REQUIREMENT

In cases involving utilities, cable companies and telephone providers, the requirement of active state supervision is met when a regulatory body, or legislative commission exists that can develop a public record, review the licensee's rates, business plans, etc. on a regular basis. *Municipal Utilities Bd. v. Alabama Power Co.*, 21 F.3d 384, 387 (11th Cir. 1994) (State statute empowering utility to divide state into service territories had a legislative review mechanism in place; legislation can meet both parts of the *Midcal* test); *DFW Metro Line v. Southwestern Bell*, 988 F.2d 601 (5th Cir. 1993) (Active supervision requirement fulfilled by the state public utility commission, which reviews and creates a record for tariffs and franchise applications in the telecom industry). Furthermore, legislation passed that has anti-competitive effects or creates advantages for one party in a given market can be self policing when the wording of the legislation provides for measures in which the state can review its own actions. *See Snake River Valley Electric Ass'n v. Pacific Corp.*, 238 F.3d 1189 (9th Cir. 2001) (statute enabling electric company to eliminate competition in the market was not "self-policing" nor was there a state method of reviewing the company's actions; therefore, active supervision was not met). Clearly, ISLANDIA's resolution was not "self policing", nor did it enact any written regulations governing THE BOARD. Regardless of the supervisory method selected, the state must show it exercised "sufficient independent judgment and control". *Ticor*, 504 U.S. 621 at 634-35.

The local municipalities, including ISLANDIA, lack the characteristics necessary to establish supervision counter to what petitioner argues. Though many local governments passed an ordinance naming THE BOARD as the exclusive provider of electrical inspections, selection alone does not constitute active supervision. THE BOARD has been left to its own devices to strengthen it's dominance by anticompetitive action without oversight from the local authorities. It is not enough that the local governments have the statutory power to select THE BOARD. Once selection is completed, active supervision must be performed to insure that the interests of a private enterprise do not supercede the community's. This can only be done by when local authorities act in a manner consistent with cases like *Municipal Utilities Board* and *DFW Metro Line*.

The Eleventh Circuit held that active supervision was met when Alabama state legislators exercise their power to review and approve the transactions entered into by a utility company and in the case of a telephone franchise. In *DFW Metro Line*, the state PUC compiles records and is the final approving body when a service provider seeks to change its tariff rates. *See also Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1147 (1st Cir.), *cert. denied*, 510 U.S. 818 (1993) (Agency review and the ability to modify proposed changes to prices "unquestionably" satisfies active supervision).

The state, in order to include the private party into its scope of immunity, must demonstrate the ability to review, and more importantly, revise actions taken by the private party. *See Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41, 50-51 (D. Mass.), *appeal dismissed*, 158 F.3d 51 (1st Cir. 1998) (No active supervision met when state lacks

the power to review or revise prices); *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) ("Where . . . the state's program is in place is staffed and funded, grants to the state officials ample power and duty to regulate pursuant to declared standards . . . more need not be satisfied.") But *see Ticor* at U.S. 621, 637-39 ("The criteria set forth by [The New England Motor Rate Bureau] may have some relevance as the beginning point of the state supervision inquiry, but the analysis cannot end there . . . The mere potential for state supervision is not an adequate substitute for a decision by the State"); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris, Inc.*, 263 F.3d 239, 255 (3d Cir. 2000) ("When it is uncertain whether an act should be treated as state action for the purposes of *Parker* immunity, we apply . . . [the *Midcal* test].")

Questionable dealings between an exclusive private party provider and other private parties can be cured by applying active state supervision. No such protection is present here. In *Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F.3d 527, 538 (6th Cir. 2002), the Sixth Circuit reasoned that: "[I]f the private actor was the effective decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state." Therefore, it was not the decision of the Village authorities naming THE BOARD as the exclusive inspection provider, but rather the exclusive provider's subsequent anticompetitive conduct that triggers the *Midcal* requirements. Private parties are not municipal agents when they make "independent decisions without the input, advice, involvement, or oversight of the Village or any other governmental body." *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 481 (6th Cir. 1990).

After considering the facts and law, the Second Circuit properly held that the petitioners had raised an issue of fact on the state action immunity affirmative defense. The *Midcal* test was properly triggered based on the record.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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